Supreme Court, U.S.
FILED
OCT 7 1997
CLERK

No. 97-402

In The

# Supreme Court of the United States

October Term, 1996

JOSEPH HARMON and MARILYN HARMON,

*Petitioners,*

*vs.*

OKI SYSTEMS, INC. and CROWN EQUIPMENT CORPORATION,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENT CROWN EQUIPMENT CORPORATION

STEPHEN E. ARTHUR
*Counsel of Record*
STEERS SULLIVAN, P.C.
*Attorneys for Respondent Crown Equipment Corporation*
251 East Ohio Street
Suite 500
P.O. Box 44126
Indianapolis, Indiana 46204
(317) 264-6814

## QUESTIONS PRESENTED

Crown Equipment Corporation ("Crown") does not accept Harmons' statement of Questions Presented set forth in Harmons' Petition for Writ of Certiorari ("Petition"). Instead, the following statement of questions is presented.

1. Did subject matter jurisdiction under 28 U.S.C. § 1332(a) exist at the time Crown removed this action from Indiana state court to the district court?

2. Did Harmons waive any defect in Crown's Removal Papers by their failure to file a Motion to Remand within the thirty (30) day period prescribed by 28 U.S.C. § 1447(c)?

3. In assessing its subject matter jurisdiction under 28 U.S.C. § 1332(a), did the district court have the discretion to consider jurisdictional facts not contained in the Removal Papers?

## PARTIES TO THE PROCEEDINGS

The Petition accurately lists the parties to the proceeding. There are no parent companies or nonwholly owned subsidiaries of Crown Equipment Corporation.

## TABLE OF CONTENTS

Page

Questions Presented . . . . . i

Parties to the Proceedings . . . . . ii

Table of Contents . . . . . iii

Table of Authorities . . . . . v

Opinions Below . . . . . 1

Statutes Involved . . . . . 1

Statement of the Case . . . . . 3

Argument Opposing Harmons' Petition . . . . . 8

I. Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) Existed at the Time Crown Removed This Action to Federal Court . . . . . 16

II. The Harmons Waived Any Defect in Crown's Notice of Removal by Their Failure to File a Motion to Remand Within the Thirty (30) Day Period Prescribed by 28 U.S.C. § 1447(c)17 . . . . . 17

**TABLE OF CONTENTS** - Continued

Page

III. The District Court Correctly Assessed its Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) and Exercised its Discretion to Consider Information Not Contained in the Removal Papers . . . . . 23

Conclusion . . . . . 26

Appendix A-Notice of Removal of Civil Action With Excerpt . . . . . 1a

Appendix B-Crown Equipment Corporation's Civil Cover Sheet . . . . . 6a

Appendix C-Excerpts from Crown Equipment Corporation's Response to Plaintiffs' Motion to Remand . . . . . 9a

Appendix D-Excerpt from Hearing on Motion to Remand-September 18, 1995 . . . . . 35a

## TABLE OF AUTHORITIES

Page

Cases

*Asociacion Nacional de Pescadores a Pequena Escala o Artesahales de Columbia v. Dow Quimica de Columbia S.A.*, 988 F.2d 559 (5th Cir. 1993), 114 S.Ct. 685 (1993) . . . . . 24

*Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991), certiorari denied, 502 U.S. 963 (1991) . . 19, 20, 21, 22

*Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424 (7th Cir. 1997) . . . . . 13, 14

*Foret v. Southern Farm Bur. Life Ins. Co.*, 918 F.2d 534 (5th Cir. 1990) . . . . . 21

*Gafford v. General Electric Co.*, 997 F.2d 150 (6th Cir. 1993) . . . . . 21, 24

*Gould v. Artisoft, Inc.*, 1 F. 3d 544 (7th Cir. 1993) . . . . . 24

*Harmon v. Crown Equipment Corporation and OKI Systems* . . . . . 3, 9, 10, 11, 13, 14, 15, 22, 27

*In Re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir. 1993) . . . . . 16, 19, 20

**TABLE OF AUTHORITIES** - Continued

Page

*In Re Matter of Continental Casualty Co.*,
29 F.3d 292 (7th Cir. 1994) . . . . . 18, 21, 23

*In Re Shell Oil Co.*,
932 F.2d 1518 (5th Cir. 1991),
112 S.Ct. 914 (1991) . . . . . 19

*Johnson v. Burken*,
930 F.2d 1202 (7th Cir. 1991) . . . . . 18

*Kennard v. Harris Corporation*,
728 F.Supp. 453 (E.D.Mich. 1989) . . . . . 22, 24

*Laughlin v. Kmart Corporation*,
50 F.3d 871 (10th Cir. 1995), certiorari denied,
116 S.Ct. 174 (1995) . . . . . 7, 8, 10, 11, 12, 13

*McCorkindale v. American Home Assur. Co.*,
909 F.Supp. 646 (N.D. Iowa 1995) . . . . . 22, 24

*Mullins v. Harry's Mobile Homes, Inc.*,
861 F. Supp. 22 (S.D. W.Va. 1994) . . . . . 24

*Opelika Nursing Home, Inc. v. Richardson*,
448 F.2d 658 (5th Cir. 1971) . . . . . 21

*Roe v. O'Donohue*,
38 F.3d 298 (7th Cir. 1994) . . . . . 17

*St. Paul Mercury Indemnity Co. v. Red Cab Co.*,
303 U.S. 283 (1938) . . . . . 15, 24

**TABLE OF AUTHORITIES** - Continued

Page

*Shaw v. Dow Brands*,
994 F.2d 364 (7th Cir. 1993) . . . . . 14, 21, 24

*United Food and Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meridian Square Inc.*,
30 F.3d 298 (2nd Cir. 1994) . . . . . 21, 24

*Unrein v. Citgo Petroleum Corp.*,
1997 WL 18181
(D.Kan. January 10, 1997). . . . . 12, 13, 22, 24

*White v. J.C. Penny Life Ins. Co.*,
861 F. Supp. 25 (S.D. W.Va. 1994) . . . . . 22

Statutes

28 U.S.C. § 1332 . . . . . 4, 6, 7, 11, 12

28 U.S.C. § 1332(a) . . . . 1, 4, 7, 8, 9, 10, 11, 15, 16, . . . . . 17, 20, 21, 23, 26

28 U.S.C. § 1441 . . . . . 11, 23

28 U.S.C. § 1441(a) . . . . . 1

28 U.S.C. § 1446(a) . . . . . 2, 17, 23

**TABLE OF AUTHORITIES** - Continued

Page

28 U.S.C. § 1447(c) . . . 1, 4, 7, 8, 9, 10, 14, 15, 17, . . . . . 18, 19, 20, 26

28 U.S.C. § 1653 . . . . . 2, 6, 7, 11, 12, 14

Constitutional Provisions

Article III, Section 2, of the United States Constitution . . . . . 1, 20, 23

Other Authorities

14A Wright and Miller, *Federal Practice and Procedure*, § 3725 (1985) . . . . . 24

14A Wright and Miller, *Federal Practice and Procedure*, § 3739 (Supp. 1996) . . . . . 18, 20

Federal Rules of Civil Procedure, Rule 11 . . . . . 2, 25

H.R. Report No. 889, 100th Cong., 2d Session 72, reprinted in 1988 U.S. Code Cong. & Admin. News 5982, 6033 . . . . . 19

Indiana Rules of Trial Procedure, Rule 8(A) . . . . . 2, 5

I

## OPINIONS BELOW

The Petition correctly cites the opinions of the appellate court and district court in this action. Crown adopts the reproduction of these opinions as set forth at App. 1a and App. 11a, respectively, of the Petition.

---

## STATUTES INVOLVED

28 U.S.C. § 1332(a) and 28 U.S.C. § 1447(c) are correctly set forth in Harmons' statement of Statutes Involved. In addition, the following citations are pertinent:

Article III -- The Judiciary -- Section 2, which states in pertinent part:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between Citizens of different States. . . .

28 U.S.C. § 1441(a) -- Actions removable generally -- which states:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

> embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1446(a) -- Procedure for Removal -- which states:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1653 -- Amendment of pleadings to show jurisdiction -- which states:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 8(A), Indiana Rules of Trial Procedure -- Claims for Relief -- which states:

> (A) Claims for Relief. To state a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, a pleading must contain:
>
> > (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and

> (2) a demand for the relief to which the pleader deems entitled. Relief in the alternative or of several different types may be demanded. However, in any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand.

---

## STATEMENT OF THE CASE

Harmons' Statement of the Case is neither accurate nor complete. The following is submitted as a more accurate statement of the case.

On July 28, 1993, Harmons filed a Complaint in the Johnson Superior Court No. 1, State of Indiana ("*Harmon*"), alleging claims against Crown based on negligent product design and strict liability, and against OKI Systems, Inc. ("OKI") on a theory of negligent maintenance (Harmons App. A, 2a, 3a; B, 11a).

Crown timely removed the case to federal court on August 20, 1993 (Harmons App. B, 11a). Harmons' Statement of the Case alleges that "during discovery" the Harmons learned about the defects in Crown's Notice of Removal (Petition, p. 3). This is false. The alleged defects at issue in this case were apparent from the face of the Notice of Removal and could have been identified by the Harmons upon receiving service of the Removal Papers in August, 1993 (Crown App. A, 1a, 2a, 3a). Discovery occurring after service of the Removal Papers had no bearing upon Harmons' failure to read the Removal Papers or to

challenge the alleged defects in a timely manner as required by 28 U.S.C. § 1447(c).

Harmons' Petition correctly states that Crown's Notice of Removal did not expressly allege an amount in controversy under 28 U.S.C. § 1332(a) (Petition, p. 3). However, Crown's Notice of Removal did state that the action was one "over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332" (Harmons App. A, 3a; Crown App. A, 2a). In addition, the Civil Cover Sheet, filed as part of the Removal Papers, stated that jurisdiction was predicated upon 28 U.S.C. § 1332 (Crown App. B, 7a). Thus, by reference, Crown's Removal Papers alleged the jurisdictional amount component of 28 U.S.C. § 1332 at the time it removed this action to federal court.

On September 28, 1994, Crown filed a Motion for Summary Judgment on all pending issues. Yet, Harmons waited almost two (2) years after removal, until August 9, 1995, to file a Motion to Remand (Harmons App. A, 3a). Harmons' Motion to Remand failed to explain why Harmons did not remand the action within thirty (30) days, even though the alleged defects were apparent upon the face of the Notice of Removal, or why Harmons waited almost two (2) years to request a remand of the action.

On September 18, 1995, the district court held a hearing on Harmons' Motion to Remand and Crown's Motion for Summary Judgment (Crown App. D, 35a-37a). In opposition to remand, Crown submitted information to the Court establishing uncontroverted evidence that, at the time of removal, the Harmons were citizens of Indiana, Crown and OKI were corporate citizens of Ohio, and the amount in controversy greatly exceeded $50,000, exclusive of interest and costs (Harmons App. A, 3a, 4a; B, 13a, 14a). Indeed,

even though asked point blank by the district court about jurisdictional amount, the Harmons flatly refused to state that their claim, at the time of removal, was less than $50,000 (Harmons App. B, 13a; Crown App. D, 35a-37a).

The record before the district court also established the following facts relevant to the amount in controversy: Harmons' Complaint described a very serious work-related injury, including "personal injuries, physical and mental pain and suffering, medical expenses, lost wages, and other pecuniary damages" (Crown App. A, 4a)[1]; Harmons' Interrogatory Answer No. 10 stated that Harmons' medical expenses, predating removal, exceeded $55,000 (Crown App. C, 11a-16a); Harmons' Interrogatory Answer No. 22 provided that Harmons had incurred expenses for wheelchairs and appliances in the sum of $2,100.68 (Crown App. C, 18a-22a); Harmons' Interrogatory Answer No. 23(d) provided that the Harmons had suffered lost wages in the amount of $80,972.00 (Crown App. C, 22a); in the Case Management Plan, filed February 24, 1994, Harmons identified special damages in the approximate sum of $65,000.00 (Crown App. C, 25a); and Harmons' attorney letter, dated July 1, 1994, stated special damages in the amount of $157,396.03, and a settlement demand on behalf of the Harmons in the amount of $1.8 million (Crown App. C, 28a-30a). In addition, Harmons requested punitive damages (Harmons App. A, 3a; Crown App. A, 4a).

On the issue of diversity of citizenship, the district court was presented with the following evidence: the

---

[1]Rule 8(A), Indiana Rules of Trial Procedure, prohibits the plaintiff from alleging a specific dollar amount when claiming personal injury or punitive damages.

Harmons reside at 200 S. Pleasant Street, Edinburgh, Indiana, and have resided in Indiana continuously for over twenty (20) years (Crown App. C, 10a). The Harmons admitted at the hearing on their Motion to Remand that they were citizens of Indiana at the time of removal (Crown App. D, 35a, 36a). OKI is an Ohio corporation (Crown App. C, 31a, 32a) and maintains its principal place of business and corporate headquarters in Cincinnati, Ohio (Crown App. C, 31a, 32a). OKI has never been incorporated or maintained its principal place of business in Indiana (Crown App. C, 32a). Similarly, Crown is an Ohio corporation and maintains its principal place of business and corporate headquarters in New Bremen, Ohio (Crown App. C, 33a, 34a). Crown has never been incorporated or maintained its principal place of business in Indiana (Crown App. C, 34a). Finally, the Civil Cover Sheet, filed as part of the Removal Papers, stated that Harmons were citizens of Indiana, and that Crown was incorporated and maintained its principal place of business in another state (Crown App. B, 7a).

On September 20, 1995, and prior to entry of summary judgment, Crown filed a Motion to Amend its Removal Papers under 28 U.S.C. § 1653. The proposed Amendment supplemented Crown's Notice of Removal by stating the citizenship of each party and an amount in controversy in excess of $50,000, exclusive of interest and costs.[2] The district court granted Crown's Motion and

---

[2]Although the district court found Crown's failure to allege a specific amount in controversy was a procedural defect, Crown intended to satisfy this requirement by expressly referencing 28 U.S.C. § 1332 in the Notice of Removal. In this regard, Crown stated the federal court has "original jurisdiction pursuant to 28 U.S.C. § 1332." Thus,

entered Summary Judgment for Crown on October 10, 1995 (Harmons App. A, 4a). The district court later entered Summary Judgment for OKI on August 13, 1996 (Harmons App. A, 4a).

On the same date the district court granted Crown's Motion for Summary Judgment, it also denied Harmons' Motion to Remand. In so doing, the district court found that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) -- namely, diversity of citizenship and amount in controversy -- clearly existed at the time of removal (Harmons App. B, 13a, 14a). The district court determined that the defects in Crown's Notice of Removal were procedural, not jurisdictional, and that Harmons had waived these defects by failing to remand the action within thirty (30) days of removal as required by 28 U.S.C. § 1447(c) (Harmons App. B, 19a). Finally, the district court determined that a federal court may consider probative post-removal information in assessing the existence of subject matter jurisdiction at the time of removal (Harmons App. B, 15a), that 28 U.S.C. § 1653 authorizes the amendment of "defective allegations of jurisdiction" (Harmons App. B, 18a, 19a), and that a federal court may consider matters outside the Complaint and Notice of Removal in deciding whether to grant a motion to remand (Harmons App. B, 15a).

In deciding the Motion to Remand, the district court considered and rejected the Tenth Circuit opinion of *Laughlin v. Kmart Corporation*, 50 F.3d 871 (10th Cir. 1995),

---

Harmons' allegation that Crown's Notice of Removal failed to make any reference to the amount in controversy requirement under § 1332 is incorrect.

certiorari denied, 116 S.Ct. 174 (1995). The district court rejected *Laughlin*, in significant part, because *Laughlin* did not discuss the application of 28 U.S.C. § 1447(c) (suggesting that *Laughlin* was decided in error) (Harmons App. B, 18a).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's order denying Harmons' Motion to Remand; its finding that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) existed at the time of Crown's removal; and its determination that a district court may consider matters outside the Notice of Removal if it "sheds light on the situation which existed when the case was removed" (Harmons App. A, 7a). The appellate court also concluded that the Harmons were guilty of "forum shopping" and noted that the Harmons did not file the Motion to Remand until it had become apparent that they were likely to lose the case on summary judgment -- almost two (2) years after Crown's removal (Harmons App. A, 2a, 7a).

---

## ARGUMENT OPPOSING HARMONS' PETITION

Harmons allege that this case will impact every federal case in which jurisdiction is based upon 28 U.S.C. § 1332(a), and that a conflict exists between the Seventh Circuit and other federal circuit courts (Petition, p. 6). These allegations are without merit and, accordingly, Harmons' Petition for Writ of Certiorari should be denied.

Harmons first incorrectly assert that this action will impact every case in which jurisdiction is based upon 28

U.S.C. § 1332(a) (Petition, p. 6). Indeed, *Harmon* exists only because Crown's Notice of Removal failed to allege certain matters under 28 U.S.C. § 1332(a), and because the Harmons failed to challenge removal within thirty (30) days as required by 28 U.S.C. § 1447(c). There are no federal cases, other than *Harmon,* in which this unique combination of pleading failures has been discussed by a federal court. Thus, *Harmon* is rare in its procedural context and the Seventh Circuit's opinion affirming federal jurisdiction will have little, if any, impact on future federal cases predicated upon diversity jurisdiction. Supreme Court Rule 10 does not contemplate review under these circumstances.

Importantly, this is an action in which federal jurisdiction has been proven by uncontroverted evidence. The district court conducted an independent examination of its jurisdiction after Harmons filed a Motion to Remand, and found that both diversity of citizenship and jurisdictional amount existed at the time of removal. Harmons have never denied these jurisdictional facts, and do not allege that the district court's evaluation of those facts was incorrect.

Harmons next allege that a split exists in the federal circuits on whether the defendant must affirmatively plead and prove the amount in controversy in the Notice of Removal (Petition, p. 6). Harmons believe that a defendant's failure to plead jurisdictional amount in this manner automatically defeats federal subject matter jurisdiction, even though the record is uncontroverted that the requirements of 28 U.S.C. § 1332(a) existed at the time of removal. Also, incredibly, Harmons suggest that a federal court has no discretion to consider evidence outside the Complaint and Notice of Removal when assessing its jurisdiction, and that a court's decision to consider such evidence constitutes reversible error.

In support of their position, Harmons allege that the Seventh Circuit's decision in *Harmon* conflicts with the Tenth Circuit's opinion in *Laughlin*, 50 F.3d 871 (Petition, pp. 6-7). However, because of the factual and procedural differences between *Harmon* and *Laughlin*, Harmons' allegation of conflict is without merit.

First, *Harmon* is based on the Seventh Circuit's finding that the Harmons waived their right to challenge defects in Crown's Notice of Removal by failing to timely file a Motion to Remand under 28 U.S.C. § 1447(c). *Laughlin* did not discuss, and apparently did not even consider, the issue of waiver under 28 U.S.C. § 1447(c). Had it done so, it could have affirmed jurisdiction because Laughlin had clearly waived the pleading defect by failing to object within the thirty (30) day period allowed by 28 U.S.C. § 1447(c).

Second, in *Laughlin*, the parties failed to raise the issue of jurisdiction before entry of judgment; in fact, jurisdiction was never challenged by remand in the district court. In contrast, in *Harmon*, jurisdiction was challenged before judgment by Harmons' Motion to Remand and the district court fully investigated the existence of subject matter jurisdiction before making an entry of summary judgment. This factual distinction is critical because the appellate court in *Laughlin* did not have a record establishing the federal court's subject matter jurisdiction, whereas, in *Harmon*, the Seventh Circuit had an uncontroverted record establishing that the requirements for subject matter jurisdiction under 28 U.S.C. § 1332(a) existed at the time of removal.

This absence of a record on appeal was highlighted by the Tenth Circuit in its statement that jurisdiction should bedenied "where such jurisdiction does not affirmatively

appear in the record." *Laughlin*, 50 F.3d at 873. Such a record existed in *Harmon*. Had a record been created in the district court in *Laughlin*, the Tenth Circuit would only have been required to review the district court's finding, based upon the record, that jurisdiction existed at the time of removal. However, because no record existed on appeal, the Tenth Circuit had no choice but to remand the action for lack of jurisdiction.

Third, *Laughlin* rejected K-Mart's attempt to satisfy the jurisdictional amount requirement by referencing 28 U.S.C. § 1441 in the Notice of Removal. The appellate court based its rejection on the fact that § 1441 does not mention jurisdictional amount and, therefore, there is no jurisdictional statement in the statute to incorporate by reference. *Laughlin*, 50 F.3d 873. In contrast, both Crown's Notice of Removal and Civil Cover Sheet expressly stated that original jurisdiction exists pursuant to 28 U.S.C. § 1332. Because § 1332(a) affirmatively provides that diversity jurisdiction requires an "amount in controversy in excess of $50,000, exclusive of interest and costs", under the dictum in *Laughlin*, Crown's reference to § 1332 should satisfy the requirement for pleading this element of subject matter jurisdiction.

Fourth, in *Laughlin*, the removing party did not correct the defects in the removal papers prior to judgment. Thus, when the appellate court decided the issue of jurisdiction, *sua sponte*, the removal papers were still defective and the record otherwise failed to establish federal jurisdiction. In contrast, Crown amended the Notice of Removal prior to entry of judgment pursuant to 28 U.S.C. § 1653. This amendment, together with an uncontroverted record establishing jurisdiction at the time of removal, formed the basis of the Seventh Circuit's decision to affirm

the district court. Such facts were absent in *Laughlin*. Moreover, although *Laughlin* is silent on how the Tenth Circuit would decide a motion by the defendant to amend the Notice of Removal to allege jurisdictional amount, under 28 U.S.C. § 1653, when the Removal Papers allege generally that "original jurisdiction" of the Court exists pursuant to 28 U.S.C. § 1332, nothing in the opinion suggests that such a motion would be denied.

Finally, a recent opinion from the Tenth Circuit, *Unrein v. Citgo Petroleum Corp.*, 1997 WL 18181 (D.Kan. January 10, 1997), has approved a federal court's discretion to review matters outside the Notice of Removal in assessing federal court jurisdiction. In that action, the defendant removed to federal court a complaint for declaratory judgment. The notice of removal alleged diversity of citizenship and that jurisdictional amount exceeded $50,000. The plaintiff's motion to remand challenged federal jurisdiction on grounds that jurisdictional amount was not specifically proven in the Notice of Removal. The defendant submitted an affidavit in support of removal setting forth the defendant's estimation of the potential economic impact resulting from plaintiff's claim. The District Court of Kansas rejected plaintiff's challenge and affirmed the discretion of a federal court to consider matters outside the Notice of Removal in assessing its jurisdiction:

> [A] plaintiff's failure to allege an amount in controversy does not necessarily preclude federal jurisdiction. When a determination cannot be made from the complaint, the court may look to the notice of removal or to affidavits submitted by the parties, or it may independently assess the monetary value of the claim. The defendant as the removing party has the burden of showing federal jurisdiction. Under the

> circumstances presented here "[d]ismissal is appropriate only if it appears to a 'legal certainty' that the jurisdictional amount is not met." The court concludes that the affidavit submitted by Citgo is sufficient to show that the amount in controversy exceeds $50,000." (citations omitted)

*Unrein*, 1997 WL 18181.

Because of the foregoing significant differences in the factual and procedural history of the *Harmon* and *Laughlin* cases, as well as the Tenth Circuit district court's holding in *Unrein*, there is no credible basis for Harmons' claim that a split of authority exists between the Circuits on this jurisdictional issue. Had *Laughlin* dealt with the same history and facts as presented in *Harmon* (namely, a defect in the removal pleading, a finding that plaintiff had waived the defect by failing to timely remand the action, a pre-judgment amendment by the defendant correcting the pleading defect, and a pre-judgment assessment by the district court that subject matter jurisdiction did exist at the time of removal), then a claim of conflict might exist. This is not the case. The *Harmon* and *Laughlin* decisions are simply too procedurally different to support Harmons' contention that the cases are in conflict. Absent a true and important conflict, grounds for granting a Petition for Writ of Certiorari do not exist under Supreme Court Rule 10(a).

Harmons next incorrectly allege that there is a split within the Seventh Circuit on whether the court may consider matters outside the removal papers in assessing its subject matter jurisdiction (Petition, p. 7). Specifically, Harmons allege that the Seventh Circuit's decision in *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424 (7th Cir. 1997) is at odds with its opinion in *Shaw v. Dow Brands*, 994 F.2d

364 (7th Cir. 1993). First, intra-circuit conflicts, to the extent they exist, do not provide grounds for a writ of certiorari under Supreme Court Rule 10.

Second, *Shaw* and *Chase* are inapposite to the *Harmon* case. In this regard, *Shaw* is a case in which the plaintiff attempted to manipulate federal jurisdiction by stating his case was worth less than $50,000, when he had earlier stated his case was worth more than $50,000. *Chase* is a case in which the plaintiff voluntarily withdrew her action after a motion to remand was denied. Subsequently, she refiled her complaint in state court, and when the defendant removed, she sought leave to amend her complaint to allege damages no greater than $49,999.99. Because in both cases, the record established that jurisdictional amount existed at the time of removal, the Seventh Circuit held that a plaintiff could not manipulate federal jurisdiction by reducing the damages claim after removal.

These are not the facts of *Harmon*. Unlike *Shaw* and *Chase*, Harmons have not attempted, post removal, to defeat jurisdiction by alleging that Harmons' damages claim is less than $50,000. *Harmon* is based on jurisdictional facts as they existed at the time of removal (not facts created by the plaintiff after removal). In addition, neither *Shaw* nor *Chase* dealt with the issue of an amendment under 28 U.S.C. § 1653 or a plaintiff's waiver of defects in removal papers under 28 U.S.C. § 1447(c). Thus, *Shaw* and *Chase* are inapposite to the facts in *Harmon* and provide no basis for this Court to grant Harmons' Petition for Writ of Certiorari.

Harmons next argue that the Seventh Circuit opinion in *Harmon* is contrary to the United States Supreme Court opinion in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Harmons' reliance on *St. Paul* is

erroneous as *St. Paul* is not in conflict with Seventh Circuit case law. Indeed, *St. Paul* involved an action in which the Seventh Circuit refused to consider an appeal because the district court had entered judgment in an amount less than the $3,000 amount in controversy requirement. The Supreme Court stated that this ruling was in error and that the "record" established that jurisdictional amount existed at the time of removal. Moreover, *St. Paul* involved a jurisdictional challenge based on events occurring subsequent to removal (a judgment entered for less than the federal jurisdictional amount). In contrast, *Harmon* does not involve a change of facts subsequent to removal, rather, the district court based its ruling solely on the jurisdictional facts that existed at the time of removal.

Harmons state that *St. Paul* stands for the principle that "amount in controversy is determined on the basis of the record at the time the petition for removal is filed" (Petition, p. 8). This is a mischaracterization of the *St. Paul* holding (indeed, this principle is not even stated at pages 291-293 of the opinion as alleged by the Harmons). Thus, *St. Paul* is not contrary to the Seventh Circuit's decision in *Harmon,* and provides no credible support for Harmons' Petition for Writ of Certiorari.

Finally, the Harmons improperly allege that *Harmon* violates the principle of federal and state comity (Petition, pp. 8-9). Quite the contrary, the Seventh Circuit has affirmed the jurisdictional requirements of 28 U.S.C. § 1332(a), has stated that these requirements must be proven in the record and exist at the time of removal, and has affirmed that a plaintiff must timely challenge procedural defects in the removal papers under 28 U.S.C. § 1447(c) in order to avoid a waiver of those defects. In short, the Seventh Circuit has soundly enforced the requirements of federal law

and the relationship between state and federal courts when an action is removed to federal court. In no manner has the Seventh Circuit's decision altered or adversely impacted the principle of comity.

## I. Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) Existed at the Time Crown Removed This Action to Federal Court.

The district court correctly determined, based on its review of the record, that the requirements for jurisdiction under 28 U.S.C. § 1332(a) existed at the time of removal. As noted in the district court's Entry of October 10, 1995, on the issue of diversity of citizenship:

> Plaintiffs do not actually claim they are or have been citizens of any state other than Indiana. They do not dispute that both defendants are and have been Ohio corporations with their principal places of business in Ohio. Crown has come forward with evidence demonstrating both points, so these elements of diversity jurisdiction, in terms of *Allstate*, clearly existed at the time of removal even if Crown failed to allege or demonstrate them at the time of removal.

(Harmons App. B, 13a).

On the issue of amount in controversy, the district court correctly concluded that the record established the Harmons had incurred damages exceeding $50,000, exclusive of interest and costs, at the time of removal. On this point, the district court stated: "by the time of removal, Joseph Harmon had already incurred medical expenses alone in excess of $55,000, as well as lost wages by that time in excess of $80,000. In addition, both plaintiffs sought

punitive damages in their state court complaint." (Harmons App. B, 14a). Importantly, the Harmons have never alleged that the amount in controversy is less than $50,000, even though they have had repeated opportunities to do so (Harmons App. B, 13a; Crown App. D, 35a, 36a).

Thus, the record presented to the district court, prior to entry of judgment, established that each prerequisite for diversity jurisdiction under 28 U.S.C. § 1332(a) existed at the time Crown removed the action to federal court.

## II. The Harmons Waived Any Defect in Crown's Notice of Removal by Their Failure to File a Motion to Remand Within the Thirty (30) Day Period Prescribed by 28 U.S.C. § 1447(c).

The district court correctly determined that Harmons' Motion to Remand was filed untimely under the requirements of 28 U.S.C. § 1447(c). Indeed, even though Harmons knew or should have known of the alleged pleading defects at the time of Crown's removal in August 1993, the Harmons waited almost two (2) years, until August 9, 1995, to challenge federal court jurisdiction (Harmons App. A, 3a). As noted by the appellate court, the Harmons filed their motion after it had become apparent that they might lose their case on summary judgment (Harmons App. A, 3a).

The first sentence of 28 U.S.C. § 1447(c) requires that "[a] Motion to Remand the case on the basis of any defect in removal procedure must be made within thirty (30) days after the filing of the Notice of Removal under section 1446(a)." *Roe v. O'Donohue*, 38 F.3d 298, 302 (7th Cir. 1994) ("[R]emoval procedures are deemed adequate save to the extent they are challenged during the first 30 days.").

> A removed case normally and in the present instance is a case within the original jurisdiction of the federal district court. If the plaintiff does not object to the removal it is as if he had refiled the case in the federal District Court. (citation omitted) He cannot be permitted to change his mind later and toss the case back to the state court.

*Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991).

The case law construing 28 U.S.C. § 1447(c) distinguishes between a defect in the removal procedure and a district court's lack of subject matter jurisdiction. In this regard, the former is waivable, whereas the latter is not. *In Re Matter of Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994) (procedural defects in removal must be timely asserted or they are waived and afford no basis for remand).

Section 1447(c) applies to all motions to remand except those in which the court actually lacks subject matter jurisdiction. 14A Wright and Miller, *Federal Practice and Procedure*, 3739, at 286 (Supp. 1996).

> [A]ll matters concerning the removal of the case to the federal court are capable of waiver...[Section] 1447(c) refers to any defect that does not involve the inability of the federal District Court to entertain the suit as a matter of its original subject matter jurisdiction.

*Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544-1545 (5th Cir. 1991), certiorari denied, 502 U.S. 963 (1991).

The term "defect in removal procedure" under 28 U.S.C. § 1447(c) includes any deficient or omitted jurisdictional allegation. Such deficiencies or omissions will not defeat jurisdiction, after the thirty (30) day period, unless the record demonstrates that subject matter jurisdiction does not, in fact, exist. *In Re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993); *In Re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), 112 S.Ct. 914 (1991). Thus, if the federal court determines that citizenship of the parties, in fact, was not diverse at the time of removal, the court must remand the action, even though the plaintiff does not assert the issue until after the thirty (30) day period under 28 U.S.C. § 1447(c).

This result is consistent with the Congressional intent underlying 28 U.S.C. § 1447(c) which protects a plaintiff's right to oppose a defectively pleaded removal (by giving plaintiff a specific period of time to oppose removal), while also protecting the court's interest in having the case proceed uninterrupted when the record demonstrates that federal court subject matter jurisdiction existed at the time of removal.

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuffling a case between two courts that each have subject matter jurisdiction.

H.R. Report No. 889, 100th Cong., 2d Session 72, reprinted in 1988 U.S. Code Cong. & Admin. News 5982, 6033. The House Committee comments are underscored by Wright and Miller who state: "[Section 1447(c)] will prevent a party who is aware of a defect in removal procedure from using the

defect as insurance against later unfavorable developments in federal court." 14A Wright and Miller, *Federal Practice and Procedure*, 3739, at 286 (Supp. 1996).

In *Allstate*, 8 F.3d 219, the district court, *sua sponte*, remanded an action because Allstate's Notice of Removal had only alleged the residence, not the citizenship, of the plaintiff. The appellate court reversed the district court and stated that a "defect in removal procedure" under 28 U.S.C. § 1447(c) means "any defect that does not go to the question of whether the case originally could have been brought in District Court." *Allstate*, 8 F.3d at 221, citing *Baris*, 932 F.2d at 1544. The appellate court concluded that Allstate's failure to allege the plaintiff's citizenship constituted a "procedural, rather than jurisdictional, defect", and that the plaintiff's Motion to Remand should have been denied. *Allstate*, 8 F.3d at 221.

Importantly, there is no Constitutional, Congressional, or public policy consideration which warrants giving the amount in controversy requirement under 28 U.S.C. § 1332(a) a higher standing than the requirement for diversity of citizenship (indeed, only diversity of citizenship is required by Article III, Section 2, of the United States Constitution). Thus, if the failure to plead citizenship, as opposed to residence, is a procedural defect subject to waiver under 28 U.S.C. § 1447(c), as held in *Allstate*, then the same result must obtain to a defect in pleading amount in controversy.

Next, the second sentence in 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Under this provision, the district court has an affirmative duty to review

the record and assess its subject matter jurisdiction. This duty is discussed fully in *In Re Matter of Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994).

In order to affirm federal jurisdiction, the district court must find that the action could have been commenced in federal court in the first instance. *Baris*, 932 F.2d at 1544-1545. This requirement simply means that the elements for jurisdiction under 28 U.S.C. § 1332(a) must actually exist at the time of removal. In making its assessment, the district court is not limited to the removal papers, but may conduct an independent investigation and, in so doing, it may consider the entire record. See *United Food and Commercial Worker's Union, Local 919, AFL-CIO v. Centermark Properties, Meridian Square Inc.*, 30 F.3d 298 (2nd Cir. 1994) (appellate court remanded action to district court to determine amount in controversy after finding record inadequate to assess jurisdiction on appeal); *Gafford v. General Electric Co.*, 997 F.2d 150 (6th Cir. 1993) (district court's evidentiary hearing on amount in controversy to determine jurisdiction on remand was proper where complaint did not specify amount of damages); *Shaw*, 994 F.2d 364; *Foret v. Southern Farm Bur. Life Ins. Co.*, 918 F.2d 534, 537 (5th Cir. 1990) ("When the jurisdiction of a federal court is challenged, that court has a duty to make the inquiries necessary to establish its own jurisdiction. The trial court is not required to follow any set procedure in determining whether the jurisdictional amount has been satisfied. 'The blueprint of the method of determining the length and breadth of the amount in controversy is entirely within the discretion of the trial court.'" quoting *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 667 (5th Cir. 1971)); *Unrein v. Citgo Petroleum Corp.*, 1997 WL 18181 (D.Kan. January 10, 1997) (opinion unpublished); *McCorkindale v. American Home Assur.Co.*, 909 F.Supp.

646 (N.D. Iowa 1995) (district court may consider affidavits on issue of jurisdictional amount when amount of damages is not apparent from face of plaintiff's complaint); *White v. J.C. Penny Life Ins. Co.*, 861 F. Supp. 25 (S.D. W.Va. 1994); *Kennard v. Harris Corporation*, 728 F.Supp. 453 (E.D. Mich. 1989). In this regard, if the requisite jurisdictional facts exist, original jurisdiction exists in the federal court.

Harmons misconstrue *Baris*, 932 F.2d 1540 and improperly state that *Harmon* could not have been filed in federal court in the first instance (Petition, pp. 11-12). The record is abundantly clear that diversity of citizenship and amount in controversy, in fact, did exist at the time of removal. Indeed, Harmons have never denied these jurisdictional facts. Under *Baris*, the issue was not, as the Harmons suggest (Petition, p. 12), whether the Notice of Removal alleged facts necessary to establish diversity jurisdiction, but whether the record establishes that diversity jurisdiction actually existed at the time of removal. The Harmons could have commenced this action in federal court in the first instance because both complete diversity and jurisdictional amount existed at the time of removal. Neither Harmons' decision to file in state court, nor their alleged lack of knowledge about the specific dollar amount of injury suffered at the time of removal, operates to defeat Crown's right to remove the action.

In sum, the district court correctly determined that the defects in Crown's Notice of Removal fell into the category of "defects in removal procedure". These defects, standing alone, might have provided Harmons a path back to state court had they requested remand within thirty (30) days from removal. This the Harmons did not do. Rather, the Harmons waited almost two (2) years from the date of

removal, and only one (1) month before the district court's scheduled hearing on Crown's Motion for Summary Judgment, to file a Motion to Remand. Once the district court determined that the Harmons had waived the defects in Crown's Notice of Removal, it properly shifted its focus to the second inquiry discussed in *In Re Matter of Casualty Co.*, and independently assessed its subject matter jurisdiction. The district court discharged this duty prior to entry of judgment, as it was required to do, confirmed that diversity jurisdiction existed at the time of removal, and properly denied Harmons' Motion to Remand.

## III. The District Court Correctly Assessed its Subject Matter Jurisdiction Under 28 U.S.C. § 1332(a) and Exercised its Discretion to Consider Information Not Contained in the Removal Papers.

Harmons incorrectly state that the Seventh Circuit has expanded federal jurisdiction beyond the United States Constitution and established Supreme Court precedent (Petition, p. 9). Harmons base their contention on a mistaken belief that federal constitutional law somehow prohibits a federal court from considering matters outside the removal papers when assessing its subject matter jurisdiction.

First, nothing in the language of Article III, Section 2, of the United States Constitution, 28 U.S.C. § 1332(a), 28 U.S.C. § 1441, or 28 U.S.C. § 1446(a) prohibits a district court from going outside the removal papers and reviewing the entire record in order to evaluate its subject matter jurisdiction.

Second, federal case law supports a federal court's discretion to go beyond the Complaint and Notice of Removal to determine the amount in controversy. *United*

*Food,* 30 F.3d 298, 305 ("[W]here the pleadings themselves are inconclusive as to the amount in controversy, however, federal courts may look outside those pleadings to other evidence in the record."); *Gould v. Artisoft, Inc.*, 1 F. 3d 544, (7th Cir. 1993); *Gafford,* 997 F.2d 150 (district court's evidentiary hearing on amount in controversy to determine jurisdiction on remand was proper where complaint did not specify amount of damages); *Shaw*, 994 F.2d at 366 (court may consider record as a whole); *Asociacion Nacional de Pescadores a Pequena Escala o Artesahales de Columbia v. Dow Quimica de Columbia S.A.*, 988 F.2d 559 (5th Cir. 1993), 114 S.Ct. 685 (1993) (post removal affidavits may be relevant where jurisdictional amount is unresolved); *Unrein*, 1997 WL 18181 (federal court may consider affidavits or independently assess jurisdiction); *McCorkindale,* 909 F.Supp. 646 (district court may consider affidavits on issue of jurisdictional amount when amount of damages is not apparent from face of plaintiff's complaint); *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22 (S.D. W.Va. 1994) (court may consider relevant matters other than complaint and removal papers); *Kennard,* 728 F. Supp. 453 (court may consider affidavits submitted in opposition to remand).

Further, Harmons' mischaracterize the requirement that the "amount in controversy is determined on the basis of the record at the time the petition for removal is filed" -- Harmons cite Wright and Miller, *Federal Practice and Procedure*, § 3725, at 417 (1985) and *St. Paul Mercury Indemnity Co.*, 303 U.S. 283 (Petition, p. 10). This requirement does not mean that a federal court is limited to allegations contained in the removal papers when assessing its jurisdiction; rather, it means the federal court must limit its inquiry to facts that existed at the time of removal. Thus, if plaintiff's damages do not exceed $50,000 at the time of

removal, but subsequently damages grow to an amount exceeding $50,000, diversity jurisdiction does not exist. On the other hand, if damages exceed $50,000 at the time of removal, then jurisdiction exists even though the facts supporting jurisdiction are not discovered until after removal. Stated differently, jurisdiction will exist as long as the facts supporting jurisdiction exist at the time of removal.

Finally, Harmons' assertion that "flood gates of removal petitions" will occur if a district court is allowed to review the entire record in assessing its jurisdiction (Petition, p. 10) is nonsense. Indeed, if the record fails to disclose a basis for jurisdiction, the district court is required to remand the action back to state court.

Moreover, there are a number of safeguards built into the removal rules which prevent the "floodgate" abuse described by the Harmons. First, F.R.C.P. Rule 11 requires the defendant to have a good faith basis for removing an action to federal court. Thus, defendants will remove only when they believe federal jurisdiction exists. Second, if a plaintiff believes a removed action lacks jurisdictional amount, then the plaintiff will file a motion to remand. Similarly, if the court determines, prior to judgment, that jurisdictional amount does not exist, the court, *sua sponte*, will conduct an independent examination to assess its jurisdiction. None of these safeguards is adversely impacted if the district court reviews the entire record to determine federal jurisdiction.

For each of these reasons, the Seventh Circuit correctly concluded that probative matters contained in the record may be considered by the district court in assessing its jurisdiction, even though those matters may not have been expressly stated in the removal papers, or even known by the defendant at the time of removal.

## CONCLUSION

Accordingly, Harmons have failed to demonstrate a true conflict in the Circuits on the jurisdictional issues asserted in their Petition, or any other basis for granting a Writ of Certiorari under Supreme Court Rule 10.

The Harmons failed to remand the action within thirty (30) days as required by 28 U.S.C. § 1447(c). Having failed to do so, the only issue remaining for the district court was whether diversity jurisdiction, in fact, existed at the time of removal. The district court undertook a close and independent examination of the record to assess its jurisdiction, and correctly determined that both diversity of citizenship and jurisdictional amount existed at the time of removal (nothing in 28 U.S.C. § 1332(a), the United States Constitution, or public policy requires the district court to limit its jurisdictional inquiry to the contents of a Notice of Removal). Based on these findings, and taking into consideration the Harmons' eleventh hour attempt to defeat federal jurisdiction in order to avoid summary judgment, the district court affirmed its jurisdiction and proceeded to resolve the action on its merits.

Simply stated, in all Circuit courts, if subject matter jurisdiction does not exist at the time of removal, the federal court will remand the action. The Seventh Circuit's opinion in *Harmon* does not change this result; indeed, *Harmon* affirms this principle. Thus, federal jurisdiction exists, and Harmons' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen E. Arthur
Of Counsel
STEERS SULLIVAN, P.C.
251 East Ohio Street
Suite 500
P.O. Box 44126
Indianapolis, Indiana 46204
(317) 264-6814

Counsel for Respondent,
Crown Equipment Corporation

## APPENDIX A — NOTICE OF REMOVAL OF CIVIL ACTION WITH EXCERPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. **IP93-1102 C**

JOSEPH and MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS, CROWN EQUIPMENT CORPORATION,

Defendants.

NOTICE OF REMOVAL OF CIVIL ACTION

Defendant, Crown Equipment Corporation ("Crown"), by counsel, pursuant to 28 U.S.C. §§ 1441 and 1446, notices the removal of an action from the Johnson Superior Court, Cause NO. 41D01-9307-CP-00199, captioned as *Joseph and Marilyn Harmon v. OKI Systems, Crown Equipment Corporation* (the "Action"), to this Court for trial and determination.

1. The Action was filed on July 28, 1993.

2. Copies of the Complaint and Process in said cause, which are collectively attached hereto as Exhibit "A," were served upon Defendant, Crown Equipment Corporation ("Crown"), on or about July 30, 1993.

3. On information and belief, Plaintiffs are residents of

Indiana. The Defendant, Crown Equipment Corporation, is an Ohio corporation doing business in Indiana. On information and belief, OKI Systems is an Ohio corporation doing business in Indiana. As such, this action is between citizens of different states as required by 28 U.S.C. § 1332.

4. Because this Action is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. §1332, it is one which may be removed to this Court by Crown, pursuant to 28 U.S.C. §§ 1441 and 1446.

5. Written notice of the filing of this Notice of Removal will be given to the Plaintiffs as required by law.

6. A true copy of this Notice will be filed with the Clerk of the Johnson Superior Court as required by law.

BOSE McKINNEY & EVANS,

s/ Stephen E. Arthur
Stephen E. Arthur
Attorney No. 4055-49
George E. Purdy
Attorney No. 10749-41

2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Attorneys for Defendant,
Crown Equipment Corporation

*Appendix A*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing "Notice of Removal of Civil Action" has been served, by United States First Class Mail, postage prepaid, upon the following counsel of record this 20th day of August, 1993:

J. Kevin King
CLINE KING & KING, P.C.
1015 Third Street
Columbus, IN 47201

s/ Stephen E. Arthur
Stephen E. Arthur

*Appendix A*

## EXCERPT FROM CROWN'S NOTICE OF REMOVAL OF CIVIL ACTION-EXHIBIT A HARMON'S COMPLAINT

* * *

. . . in the forklift to prevent or warn against the traveling of the forklift after the operator dismounted. Defendant Crown knew or in the exercise of reasonable care, should have known, the forklift would travel after the operator dismounted the forklift.

3. Defendant Crown had a duty to design and manufacture of the forklift to prevent or warn against such traveling. Defendant Crown breached its duty, and accordingly, Joe was injured.

4. As a proximate result of Defendant Crown's negligence, Joe suffered damages including, but are not limited to, personal injuries, physical and mental pain and suffering, medical expenses, lost wages, and other pecuniary damages.

5. The actions of Defendant Crown constituted reckless and wanton disregard for human safety. Accordingly, a judgement of punitive damages should be imposed to deter the conduct of Defendant Crown.

WHEREFORE, Joe and Marilyn, by counsel, pray for a judgment in an amount which will reasonably compensate them for their injuries incurred as a result of the negligence of Defendant Crown; a judgement of punitive damages to deter the reckless conduct of the Defendant Crown; costs of this action, and for all other necessary and proper relief under the premises.

*Appendix A*

Respectfully submitted,
CLINE, KING & KING, P.C.

s/ J. Kevin King
J. Kevin King, #10849-03

s/ Peter C. King
Peter C. King, #5394-03

COUNT II: STRICT LIABILITY: CROWN

1. Joe and Marilyn reallege and incorporate herein by reference each and every allegation contained in paragraph 1 of Count I as if fully set out herein.

2. Prior to July 26, 1991, the forklift was placed in the stream of commerce by Defendant Crown.

3. At the time Defendant Crown placed the forklift in the stream of commerce, it contained an unreasonably dangerous condition in that there was no warning or safety device regarding the foreseeable condition that the forklift would travel after the operator dismounted. Defendant Crown is strictly liable . . .

* * *

**APPENDIX B — CROWN EQUIPMENT CORPORATION'S CIVIL COVER SHEET**

**CIVIL COVER SHEET**

**IP93-1102 C**

* * *

**I. (a) PLAINTIFFS:**

*JOSEPH and MARILYN HARMON*

* * *

**DEFENDANTS:**

*OKI SYSTEMS, CROWN EQUIPMENT CORPORATION*

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT *Ohio Corp.*

* * *

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER):

*J. Kevin King*
*CLINE KING & KING, P.C.*
*1015 Third Street*
*Columbus, IN 47201 (812) 372-8461*

*Appendix B*

ATTORNEYS (IF KNOWN):

*Stephen E. Arthur*
*BOSE McKINNEY & EVANS*
*2700 First Indiana Plaza*
*135 North Pennsylvania Street*
*Indianapolis, IN 46204 (317) 684-5000*

**II. BASIS OF JURISDICTION** (Place an x in one box only):

* * *

☒ **4 Diversity**
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an x in one box for plaintiff and one box for defendant): (For Diversity Cases Only)

| | PTF | DEF |
|---|---|---|
| Citizen of This State | ☒ 1 | ☐ 1 |

* * *

| | | |
|---|---|---|
| Incorporated *and* Principal Place of Business in Another State | ☐ 5 | ☒ 5 |

* * *

**IV. CAUSE OF ACTION** (Cite the U.S. civil statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.):

*28 U.S.C. §1332; 28 U.S.C. §§1441 and 1446.*

*Appendix B*

**V. NATURE OF SUIT** *(Place an x in one box only)*:

* * *

TORTS

PERSONAL INJURY:

☒ 365 Personal Injury — Product Liability

* * *

**VI. ORIGIN** *(Place an x in one box only)*:

* * *

☒ 2 Removed from State Court

* * *

| DATE | SIGNATURE OF ATTORNEY OF RECORD |
|---|---|
| *8-20-93* | *Attny #4055-49* s/ Stephen E. Arthur |

## APPENDIX C — EXCERPTS FROM CROWN EQUIPMENT CORPORATION'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT A-HARMONS' ANSWERS TO CROWN'S 1ST SET OF INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102C

JOSEPH and MARILYN HARMON,

Plaintiffs

v.

OKI SYSTEMS, CROWN EQUIPMENT CORPORATION,

Defendants.

CROWN EQUIPMENT CORPORATION'S FIRST SET OF INTERROGATORIES TO PLAINTIFFS

Comes now Joseph and Marilyn Harmon, by counsel, and responds to Defendant Crown Equipment Corporation's First Set of Interrogatories to Plaintiffs.

*Appendix C*

*Interrogatories*

1. State:

   a. Your full name;

      Joseph G. Harmon.

   b. Last address;

      200 S. Pleasant St., Edinburgh, IN 46124.

   c. Marital status at time of the accident;

      Married.

   d. Social security number, and;

      SSN#311-40-2836.

   e. Date and place of birth.

      DOB: November 6, 1941 in Edinburgh, Indiana.

2. State:

   a. The name and location of each school you have attended;

      (1) Edinburgh Elementary

      (2) Edinburgh High School

*Appendix C*

b. The month and year (s) of attendance, and;

* * *

See answer a above.

10. Itemize the medical expenses you claim to have incurred as a result of the Accident.

The following is an itemization to date of all billings in possession of myself or my attorneys:

*Int. Med. Associates*

07/30/91 – Comprehensive Initial Consultation ..... $150.00
07/31/91 – Intermediate Subsequent Hospital Care ..... 60.00
08/01/91 – Intermediate Subsequent Hospital Care ..... 840.00

TOTAL ..... $1,050.00

*C. Scott Vore, M.D.*

07/29/91 – Toe Repair ..... $385.00

*Richard L. McCammon, M.D.*

08/05/91 – Cleansing of Skin/Tissue ..... $315.00

*Scott Beall, M.D.*

08/09/91 – ..... $ 280.00
08/12/91 – ..... 1,260.00

TOTAL ..... $1,540.00

*Appendix C*

*Irvington Radiologists, Inc.*

| | | |
|---|---|---|
| 07/29/91 | – Chest, Single View | $19.00 |
| | – Ankle, AP & Lateral | 17.00 |
| | – Ankle, AP & Lateral | 17.00 |
| | – Foot, AP & Lateral | 17.00 |
| | TOTAL | $70.00 |

*Infectious Disease of Indiana*

| | | |
|---|---|---|
| 07/30/91 | – IH Consultation | $139.00 |
| 07/31/91 | – IH Daily Visit | 518.00 |
| 08/14/91 | – IH Discharge Management | 53.00 |
| 08/22/91 | – IH Consultation | 139.00 |
| 08/23/91 | – IH Daily Visit | 259.00 |
| 11/14/91 | – IH Discharge Management | 53.00 |
| | TOTAL | $1,161.00 |

*Physician Diagnostic Consultants, Inc.*

| | | |
|---|---|---|
| 07/30/91 | – CPK Isoenzyme | $ 55.00 |
| 08/05/91 | – Sug Path Uncmplictd | 88.00 |
| 08/06/91 | – Surg Path Uncmplictd | 88.00 |
| 08/12/91 | – Surg Path Uncmplictd | 88.00 |
| | TOTAL | $319.00 |

*James B. Tandy, M.D.*

| | | |
|---|---|---|
| 08/26/91 | – Initial IP Consult | $125.00 |
| 08/27/91 | – DV – C | 80.00 |

*Appendix C*

| | | |
|---|---|---|
| 08/29/91 | – DV – C | 80.00 |
| 08/30/91 | – DV – C | 80.00 |
| | TOTAL | $365.00 |

*Michael S. Yacko, M.D.*

| | | |
|---|---|---|
| 08/02/91 | – Anesthesiologist | $256.00 |

*Community Pulmonary Associates, Inc.*

| | | |
|---|---|---|
| 08/24/91 | – Initial Consultation Complex | $175.00 |
| 08/25/91 | – Hospital Care Intermediate | 390.00 |
| | TOTAL | $565.00 |

*Columbus Regional Hospital*

| | | |
|---|---|---|
| 12/06/91 | – Outpatient Services | $247.50 |

*Castleton Orthopaedic Clinic, Inc. — R. Daniel Zieg, M.D.*

| | | |
|---|---|---|
| 07/29/91 | – ER After Hours | $100.00 |
| | – Arthrotomy Fo | 525.00 |
| | – Disloc Tarsom | 1,065.00 |
| 08/05/91 | – Fx Ankle Bima | 1,365.00 |
| | – Arthrotomy | 704.00 |
| | – Fx Calcaneus | 1,239.00 |
| | – Debridement S | 557.00 |
| 08/12/91 | – Debridement S | 557.00 |
| | – Fx MT ORIF | 803.00 |
| | – Fx MT ORIF | 803.00 |
| | – Fx MT ORIF | 803.00 |

*Appendix C*

| | | |
|---|---|---|
| 11/05/91 | – Intermediate | $35.00 |
| | – Ankle X-ray | 45.00 |
| | – Foot X-ray | 45.00 |
| 01/27/92 | – OV EST PT INT | 35.00 |
| | – Foot X-ray | 45.00 |
| 02/24/92 | – Intermediate | 35.00 |
| | – Foot X-ray | 45.00 |
| | – Ankle X-ray | 45.00 |
| 03/24/92 | – OV EST PT EXT | 40.00 |
| | – Foot X-ray | 45.00 |
| | – Ankle X-ray | 45.00 |
| 04/21/92 | – OV ESTABLE PT | 45.00 |
| | – Knee X-ray | 50.00 |
| | – Foot X-ray | 45.00 |
| 04/29/92 | – Removal Impla | 588.00 |
| | – Manipul Ankle | 373.00 |
| 05/11/92 | – Ankle X-ray | 45.00 |
| 06/15/92 | – Ankle X-ray | 45.00 |
| | – OV ESTAB PT | 30.00 |
| 07/06/92 | – Ankle X-ray | 50.00 |
| 08/17/92 | – OV ESTABL PT | 50.00 |
| | – Foot X-ray | 50.00 |
| 09/09/92 | – Ostectomy Cal | 1,365.00 |
| | – Debride Wound | 276.00 |
| 09/28/92 | – Heel X-ray | 45.00 |
| 11/16/92 | – OV ESTAB PT | 35.00 |
| | – Heel X-ray | 45.00 |
| 05/17/93 | – Office Visit | 50.00 |
| 06/28/93 | – Disability Form | 20.00 |
| 08/16/93 | – Calcaneal Spu | 35.00 |
| 11/22/93 | – Calcaneal Spu | 35.00 |
| | TOTAL | $12,258.00 |

## *Appendix C*

*Community Hospitals Indianapolis*

| | | |
|---|---|---|
| 07/29/91 | – Pharmacy | $ 116.80 |
| | – IV Solutions | 75.00 |
| | – Medical/Surgical Supply | 543.00 |
| | – Laboratory | 65.00 |
| | – Lab/Chemistry | 103.00 |
| | – Lab/Hemotology | 28.00 |
| | – Lab/Bact-Micro | 64.00 |
| | – Radiology Diagnostic | 179.00 |
| | – Diagnostic Chest X-ray | 54.00 |
| | – Operating Room Services | 595.00 |
| | – Anesthesia | 105.00 |
| | – Respiratory Services | 38.00 |
| | – Emergency Room | 303.00 |
| | – Recovery Room | 291.00 |
| | – EKG/ECG | 58.00 |
| 08/14/91 | – Room & Board Semi PVT | 5,136.00 |
| | – Pharmacy | 5,839.00 |
| | – Pharmacy Take Home Drugs | 147.80 |
| | – Drugs/Radiology | 113.00 |
| | – IV Solutions | 463.00 |
| | – Medical/Surgical Supply | 3,225.00 |
| | – Prosthetic Device | 39.00 |
| | – Laboratory | 508.00 |
| | – Lab/Chemistry | 225.00 |
| | – Lab/Hemotology | 291.00 |
| | – Lab/Bact-Micro | 645.00 |
| | – Laboratory Pathological | 157.00 |
| | – Radiology Diagnostic | 944.00 |
| | – Diagnostic Chest X-ray | 172.00 |
| | – Nuclear Med. Diagnostic | 643.00 |
| | – Operating Room Services | 3,508.00 |

*Appendix C*

| | | |
|---|---|---|
| | – Anesthesia | 735.00 |
| | – Respiratory Services | 421.00 |
| | – Physical Therapy | 35.00 |
| | – Physical Therapy Eval/Re-Eval | 40.00 |
| | – Recovery Room | 644.00 |
| 08/21/91 | – OR Class A-lst HR | 940.00 |
| | – Anesthesia – 1st HR | 175.00 |
| 08/30/91 | – Room & Board Semi PVT | 2,889.00 |
| | – Pharmacy | 966.05 |
| | – Pharmacy Take Home Drugs | 576.13 |
| | – Drugs/Radiology | 113.00 |
| | – IV Solutions | 100.00 |
| | – Medical/Surgical Supply | 1,069.00 |
| | – Laboratory | 148.00 |
| | – Lab/Chemistry | 59.00 |
| | – Lab/Hemotology | 178.00 |
| | – Lab/Bact-Micro | 91.00 |
| | – Radiology Diagnostic | 62.00 |
| | – Diagnostic Chest X-ray | 108.00 |
| | – Nuclear Med. Diagnostic | 643.00 |
| | – Operating Room services | 753.00 |
| | – Anesthesia | 140.00 |
| | – Respiratory Services | 16.00 |
| | – Recovery Room | 322.00 |
| | – EKG/ECG | 58.00 |
| 10/20/91 | – Radiology Diagnostic | 141.00 |
| | TOTAL | $36,095.78 |

*Indiana Surgery Center*

| | | |
|---|---|---|
| 06/03/92 | – | $1,412.07 |

*Appendix C*

11. Have you ever made any claims for:

Objection: This information calls for information which is objectionable pursuant to the collateral source rule. Without waiving any objections, my answer would be:

a. Worker's compensation,

Yes.

b. Social security disability,

Yes.

c. Medicaid,

Yes.

* * *

. . . and the approximate amount of money expended to date for the purchase of each medication listed.

I have taken Relafen, Voltaren, Feldene, PROPO-N/APAP100-650, Loestrin-Fe, Cephalexin, Duoderm, Polysporin, and Propacet. Find attached a computer printout from my pharmacy containing the dates, costs, and amounts taken as a result of this injury.

20. Describe, with particularity, the extent to which you allege that your injuries have resulted in permanent partial impairment, temporary total disability, or total disability, and

specify how you have calculated the exact dates and degree/ percentage of said disabilities.

Objection: This answer calls for an expert opinion which I am unable to answer. Without waiving any objections, I cannot walk or stand for very long periods of time. I cannot put pressure on my injured foot.

21. Has any physician or Healthcare Provider prepared any written statement or report as to your impairment rating of the person as a whole? If so, please state the name, address, and telephone number of each Healthcare Provider who has prepared a report, the date of each report, and the current custodian of each report.

None at this time.

22. If, since the date of the Accident, you have been required to use any appliance, such as a cane, crutch, medical brace, wheelchair, corset, or other device:

a. Describe the type of each device;

(1) Stretcher and Ambulance Service.

(2) Wheel chair.

(3) Crutches.

(4) Cane.

(5) Walker.

(6) Electric hospital bed.

*Appendix C*

b. The date it was prescribed;

(1) August of 1991 to November of 1991.

(2) November of 1991 to January of 1992.

(3) January of 1992 to the present.

(4) See (3) above.

(5) See (3) above.

(6) September of 1991 to October of 1991.

c. The period during which the device has used, and;

See b. above.

d. The Healthcare Provider who prescribed it;

Dr. Kincead.

e. The approximate amount of money expended by you to date for the purchase and/or rental of the device.

08/23/91 - S/E Bed with side rails/ half rails ..... $ 256.08
09/10/91 - Electric Hosp. Bed ..... 155.00
09/10/91 - Half Length Side rails ..... 15.00
09/10/91 - Full Fracture Frame Invacare ..... 40.00
09/27/91 - Ambulance Wheelchair Service ..... 70.00
09/30/91 - Ambulance Wheelchair Service ..... 70.00

*Appendix C*

10/01/91 - Walker Folding Youth ..... 15.75
10/01/91 - Adult Folding Walker Pharmasea ... 15.75
10/02/91 - Ambulance Wheelchair Service..... 70.00
10/03/91 - Adult Folding Walker Pharmasea ... 15.75
10/03/91 - Walker Folding Youth ..... 15.75
10/03/91 - Walker Extension Legs Guardian ..... 5.25
10/04/91 - Ambulance Wheelchair Service..... 70.00
10/07/91 - Ambulance Wheelchair Service..... 70.00
10/09/91 - Ambulance Wheelchair Service..... 70.00
10/10/91 - Electric Hospital Bed..... 155.00
10/10/91 - Half Length Side rails..... 15.00
10/10/91 - Full Fracture Frame Invacare..... 40.00
10/11/91 - Ambulance Wheelchair Service..... 70.00
11/03/91 - Adult Folding Walker Pharmasea ... 15.75
11/03/91 - Walker Folding Youth ..... 15.75
11/03/91 - Walker Extension Legs Guardian ..... 5.25
11/04/91- Elevating Leg rest Breezy..... 8.40
11/04/91 - LT WT Wheelchair Breezy ..... 63.00
12/03/91 - Walker Folding Youth ..... 15.75
12/03/91 - Walker Extension Legs Guardian ..... 5.25
12/04/91 - Elevating Leg rest Breezy..... 8.40
12/04/91 - LT WT Wheelchair Breezy ..... 63.00
01/03/92 - Walker Extension Legs Guardian ..... 5.00
01/03/92 - Walker Folding Youth ..... 15.00
01/04/92 - Elevating Leg rest Breezy..... 8.00
01/04/92 - LT WT Wheelchair Breezy ..... 60.00
01/31/92 - Large Base Quad Cane ..... 37.80
02/03/92 - Walker Extension Legs Guardian ..... 5.00
02/03/92 - Walker Folding Youth ..... 15.00
02/04/92 - Elevating Leg rest Breezy..... 8.00
02/04/92 - LT WT Wheelchair Breezy ..... 60.00
03/03/92 - Walker Extension Legs Guardian ..... 5.00
03/03/92 - Walker Folding Youth ..... 15.00

*Appendix C*

03/04/92 - Elevating Leg rest Breezy ..... 8.00
03/04/92 - LT WT Wheelchair Breezy ..... 60.00
04/03/92 - Walker Extension Legs Guardian ..... 5.00
04/03/92 - Walker Folding Youth ..... 15.00
05/03/92 - Walker Extension Legs Guardian ..... 5.00
05/03/92 - Walker Folding Youth ..... 15.00
06/03/92 - Walker Extension Legs Guardian ..... 5.00
06/03/92 - Walker Folding Youth ..... 15.00
07/03/92 - Walker Extension Legs Guardian ..... 5.00
07/03/92 - Walker Folding Youth ..... 15.00
08/03/92 - Walker Extension Legs Guardian ..... 5.00
08/03/92 - Walker Folding Youth ..... 15.00
09/03/92 - Walker Extension Legs Guardian ..... 5.00
09/03/92 - Walker Folding Youth ..... 15.00
10/03/92 - Walker Extension Legs Guardian ..... 5.00
10/03/92 - Walker Folding Youth ..... 15.00
11/03/92 - Walker Extension Legs Guardian ..... 5.00
11/03/92 - Walker Folding Youth ..... 15.00
12/03/92 - Walker Extension Legs Guardian ..... 5.00
12/03/92 - Walker Folding Youth ..... 15.00
01/03/93 - Walker Extension Legs Guardian ..... 5.00
01/03/93 - Walker Folding Youth ..... 15.00
02/03/93 - Walker Extension Legs Guardian ..... 5.00
02/03/93 - Walker Folding Youth ..... 15.00
03/03/93 - Walker Extension Legs Guardian ..... 5.00
03/03/93 - Walker Folding Youth ..... 15.00
04/03/93 - Walker Extension Legs Guardian ..... 5.00
04/03/93 - Walker Folding Youth..... 15.00
05/03/93 - Walker Extension Legs Guardian ..... 5.00
05/03/93 - Walker Folding Youth ..... 15.00
06/03/93 - Walker Extension Legs Guardian ..... 5.00
06/03/93 - Walker Folding Youth ..... 15.00
07/03/93 - Walker Extension Legs Guardian ..... 5.00

*Appendix C*

07/03/93 - Walker Folding Youth ..... 15.00
07/20/93 - Walker Extension Legs Guardian ... 12.00
07/20/93 - Walker Folding Youth ..... 22.00

Total ..... $2,100.68

Find attached a listing from Hooks regarding the walker, wheelchair, electric hospital bed, and quad cane. Also attached is billing statements for the cost of the ambulance and stretcher from Meyers Ambulance Service.

23. Do you claim lost income or wages as a result of the Accident? If so, state the following:

a. The name and address of your employer;

See answer 3 above.

b. The date(s) which you were unable to work;

From the date of the incident to present.

c. Your rate of pay, whether hourly or salary;

Hourly, $16.33 – $653/wk.

d. Your total lost income incurred to date; and,

124 weeks from date of loss to present. 124 * $653 = $80,972.

e. All future lost income, if any, that you claim resulted from the Accident.

Objection: This would require a present calculation of future income. I am not qualified to perform such a calculation.

24. List all workers' compensation claims, or claims for any social security disability, Medicaid, healthcare, unemployment, disability, or other benefits which you have made both prior to and since the Accident. Identify any individual or organization who claims or may claim a lien for any monies paid to you as a result of this Accident, and the amount of such lien.

Objection: This question is over broad. It requires the Plaintiff to state all worker's compensation claims, or claims for any social security disability, medicaid, health care, unemployment, disability, or other benefits which he has made both prior to and since the accident. Mr. Harmon is 52 years old. It is also contrary to *Canfield vs. Sandock*, (1990) 563 N.E.2d 526 and *Becker vs. Plemmons*, (1992) Ind.App. 598 N.E.2d 564. Without waiving any objections my answer would be: Liberty Mutual has a lien for monies paid as a result of this incident.

25. Does Mr. Harmon have a prescription for eyeglasses or contact lens or does he wear eyeglasses or contact lens? If so,:

a. Was he wearing his eyeglasses or contact lens at the time of the Accident, and;

Yes.

*Appendix C*

b. Identify your prescription;

As of 8/13/92 it was 20/20 with proper corrective wear.

* * *

*Appendix C*

## EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT B-CASE MANAGEMENT PLAN-PAGE 2

* * *

II. *Factual Synopsis*:

A. *Plaintiffs*

Joe Harmon worked at Cummins Engine Company, Indianapolis, Indiana. He was a janitor who operated a fork lift manufactured by Crown and distributed by OKI.

On July 29, 1991, Joe was operating a fork lift at Cummins. Joe had stopped to get off the fork lift. Once stopped, Joe got off and walked around to the front of the fork lift to move something. Once in front of the fork lift, the brakes failed to keep the fork lift from moving. The fork lift pinned Joe Harmon between it and a concrete wall.

As a result of the incident, Joe has undergone extensive surgery and incurred medical expenses of approximately $65,000. Joe is permanently disabled from his occupation. He suffers from disfiguration and mobility of his right foot. This affects his walking, standing, and balance. Marilyn is required to help Joe on a daily basis.

B. *Defendants*

Defendants Crown Equipment Corporation and OKI Systems incorporate herein the factual assertions and

denials contained in their Answers and Affirmative Defenses to Plaintiffs' Complaint previously filed in this cause.

III. *Legal Theories*:

*Plaintiffs*:

*COMMON ALLEGATIONS AS TO ALL COUNTS*

At all times material to this action, Plaintiffs, Joseph and Marilyn Harmon were residents of the County of Johnson, State of Indiana. All times material to this action, Defendant Crown Equipment Corporation (hereinafter "Crown") was and is an organization existing under the laws if the State of Ohio and licensed to do business in the state of Indiana and doing business in the County of Johnson, State of Indiana. Crown produced and manufactured forklifts for purpose of sale and distribution in the United States of America, including State of Indiana, Johnson County. At all times material to this action, Defendant OKI Systems (hereinafter "OKI") was and is an organization existing under the laws of the State of Ohio and licensed to do business in the State of Indiana and doing business in the County of Johnson, State of Indiana. OKI sold, distributed, and maintained the forklift manufactured by Crown which is the subject matter of this litigation. All times material to this action, Cummins Engine Company (hereinafter "Cummins") was and is an organization existing under the laws if the State of Indiana and licensed to do business in the state of Indiana and doing business in the County of Marion, State of Indiana. Cummins purchased or leased the forklift in question.

*Appendix C*

Al times material to this action, Defendant Crown designed, manufactured, assembled, and distributed the forklift in issue, model number 45-RRTT-S; serial number H-15440-4 (hereinafter "forklift") that is the subject of this action. Al times material to . . .

* * *

*Appendix C*

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT-C-HARMONS' ATTORNEY LETTER

**CLIVE**
**KING &**
**KING, P.C.**

*1015 Third Street*
*P.O. Box 250*
*Columbus, Indiana*
*47202-0250*

*Telephone*
*812-372-8461*

*Facsimile*
*812-372-2544*

*July 1, 1994*

*Stephen E. Arthur/George E. Purdy*
*Bose McKinney & Evans*
*2700 First Indiana Plaza*
*135 N. Pennsylvania Street*
*Indianapolis, Indiana 46204*
*Fax: 317-684-5173*

*Randell Helman*
*Hume Smith Geddes & Green*
*54 Monument Circle, Suite 400*
*Indianapolis, IN 46204*
*Fax: 317-632-5595*

*Appendix C*

*Re: Richard and Sandra Finchum v. Ford Motor Company and Kia Motors Company, Cause No. IP 92 39 4C*

*Counsel:*

*Find enclosed Plaintiffs' Preliminary Witness and Exhibit Lists and Plaintiffs' Preliminary Contentions which were filed today pursuant to the Case Management Plan.*

*With regard the statement of special damages, please see Plaintiffs' Interrogatory Answers (10, 22e, and 23d regarding medical expenses and lost wages claimed as a result of this incident). Also see Plaintiffs' responses to Defendants' Request for Production #4. You have been in possession of this information since January 6, 1994. The following is a listing of the information in the above referenced interrogatories:*

| | |
|---|---|
| *Past Medical Expenses* | *$56,039.35* |
| *Costs (Stretcher/Ambulance, Wheel chair, Crutches, Care Walker, Electric bed)* | *2,100.68* |
| *124 weeks (July 29, 1991 to December 13, 1993)* | *80,972.00* |
| *28 weeks (December 20, 1993 to June 27, 1994)* | *18,284.00* |
| *Total of Special Damages as of January 6, 1994* | *$157,396.03* |

*There was another surgery on Joe's foot in February 1994. As of this date, our firm has not received the billing statement outlining the charges associated with this surgery. With regard to lost wages, the above numbers are extremely conservative. The amount does not include any type of raises in which Joe would have received over the three and half years he has been out of work.*

*Appendix C*

*Marilyn has been damaged by the loss of consortium and companionship. Marilyn is the primary care taker of Joe. She is required to be around Joe to assist with any problems he may have with his foot, balance, or walking.*

*You have deposed Joe and Marilyn and know they are honest folks. You also know about the lost quality of life they have endured. The lost quality of life for the Harmons cannot be described in a letter. However, every aspect of their life has been affected from leisure time to work.*

*Based upon the above, our victims have authorized our firm to demand $1.8 million dollars for settlement of this action. This amount can be divided in any manner agreed upon by both Defendants.*

*The purpose of this letter is for settlement only and should not be construed for any other purpose. This letter is being mailed to your attention on July 1, 1994.*

*With kind regards, I remain.*

*Cordially,*

*CLINE, KING & KING, P.C.*

s/ J. Kevin King
*J. KEVIN KING*

*JKK/mjn*

*Appendix C*

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT F-AFFIDAVIT OF RICHARD JOHNSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102-C H/G

JOSEPH AND MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants.

AFFIDAVIT OF RICHARD JOHNSON

Affiant, Richard Johnson, being duly sworn upon his oath, states as follows:

1. Mr. Johnson is the Operations Manager for OKI Systems, Inc., and has personal knowledge of the matters stated in this Affidavit.

2. OKI Systems, Inc. is a corporation incorporated in the State of Ohio. OKI Systems, Inc. maintains its principal place of business and corporate headquarters in Cincinnati, Ohio. In addition, on the date Plaintiffs filed their Complaint, July 28, 1993, and on the date removed this action, August 20, 1993,

*Appendix C*

OKI Systems, Inc. was an Ohio corporation maintaining its principal place of business and corporate headquarters in Cincinnati, Ohio.

3. OKI Systems, Inc. has never been incorporated in the State of Indiana and has never maintained a principal place of business in the State of Indiana.

Further, Affiant saith not.

s/ Richard Johnson
Richard Johnson

*Appendix C*

EXCERPT FROM CROWN'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND-EXHIBIT G-AFFIDAVIT OF JOHN MAXA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION NO. IP93-1102-C H/G

JOSEPH AND MARILYN HARMON,

Plaintiffs,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants.

AFFIDAVIT OF JOHN MAXA

Affiant, John G. Maxa, being duly sworn upon his oath, states as follows:

1. Mr. Maxa is the Vice President and General Counsel for Crown Equipment Corporation, and has personal knowledge of the matters stated in this Affidavit.

2. Crown Equipment Corporation is a corporation incorporated in the State of Ohio. Crown Equipment Corporation maintains its principal place of business and corporate headquarters in New Bremen, Ohio. In addition, on the date Plaintiffs filed their Complaint, July 28, 1993, and the date

*Appendix C*

Crown Equipment Corporation removed this action, August 20, 1993, Crown Equipment Corporation was an Ohio corporation maintaining its principal place of business in New Bremen, Ohio.

3. Crown Equipment Corporation is not incorporated in the State of Indiana and has never maintained its principal place of business in the State of Indiana.

* * *

## APPENDIX D — EXCERPT FROM HEARING ON MOTION TO REMAND DATED SEPTEMBER 18, 1995

EXCERPT FROM HEARING ON MOTION
TO REMAND-SEPTEMBER 18, 1995

* * *

[6]MR. KING: I am sorry?

THE COURT: Do you contend that Mr. and Mrs. Harmon are citizens of any state other than the state of Indiana?

MR. KING: Your Honor, at this point I do not. But that is not the critical point of analysis at the time of the removal.

THE COURT: I understand.

Do you dispute that they were citizens of Indiana at the time of the removal or at the time the complaint was filed?

MR. KING: Okay.

THE COURT: Do you dispute that they were citizens of Indiana at the time the complaint or petition for removal were filed?

MR. KING: Your Honor, I do not. But again, that is not our burden. The burden is upon the removing party to affirmatively show those to this court.

THE COURT: I understand your argument.

Next, do you contend that the defendants are citizens of Indiana, or were at any relevant point?

MR. KING: I do not know the answer to that question, your Honor, at the time of removal. Because the burden is upon the removing party to show that to the court. That is not my burden.

THE COURT: I understand your position.

Now, I have got some more questions about that. But do you [7] dispute that you and — rather, that each of the Harmons is seeking in excess of $50,000 in damages?

MR. KING: Your Honor, at the time of removal, I can tell this court that I don't know with a reasonable probability whether this case is worth more than $50,000.

THE COURT: Okay, what changed between that and the settlement?

MR. KING: Well, your Honor, naturally, there is some discovery that would occur. The court requested us — and I want to make it very clear that the settlement was part of — the settlement demand was part of the pretrial order that forced the plaintiffs to essentially come forward with something. And that was pursuant to a case management plan.

That was after the removal petition. And again, that is not my burden because the law requires us to look at the time of removal.

THE COURT: What changed between the time of removal and the time of worry about a settlement?

MR. KING: Well, your Honor, I believe that further discovery, preparing the case for interrogatory answers, requests

for production of documents, all of those type of things would then come around to being, which would occur after the point of removal.

Your Honor, established case law requires this court to remand this case for Crown's failure to have subject matter . . .

* * *